RECEIVED
SEP 12 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. _____

78-5384

DAVID SANDSTROM, Petitioner

-v-

STATE OF MONTANA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MONTANA

BYRON W. BOGGS
ATTORNEY FOR PETITIONER
212 East Park Avenue
Anaconda, Montana 59711

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of Case	2
Reasons for Granting Writ	5
I. THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS," DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF THE LAW.	5
II. THE MONTANA SUPREME COURT DECISION, IN PETITIONER'S APPEAL, IS NOT IN ACCORD WITH WINSHIP, MULLANEY, OR PATTERSON.	5
III. JURY INSTRUCTIONS, OF THE TYPE THE PETITIONER HEREIN COMPLAINS, HAVE BEEN HELD BY A NUMBER OF FEDERAL CIRCUIT COURTS OF APPEAL TO BE VIOLATIVE OF DUE PROCESS OF LAW.	8
IV. PRESUMPTIONS IN MONTANA HAVE THE WEIGHT AND EFFECT OF EVIDENCE AND SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.	9
V. THE ISSUE OF PETITIONER'S INTENT WAS PROPERLY RAISED BY THE TRIAL EVIDENCE AND SHOULD HAVE BEEN SUBMITTED TO THE JURY FOR A DETERMINATION OF INNOCENCE, OR GUILT BEYOND A REASONABLE DOUBT WITHOUT THE STATE HAVING BENEFIT OF A PRESUMPTION.	11
Conclusion	13
Appendix A: Opinions Below	
Opinion of the Supreme Court of Montana of June 8, 1978	14
Rehearing Order of June 28, 1978	21
Judgment of June 29, 1978	22
Journal Entry of Judgment of Judgment of July 25, 1977, of the District Court of the Third Judicial District of the State of Montana	24
Verdict	26
Appendix B: Miscellaneous	
Information	27

TABLE OF CASES

	Page
Bloch v. United States, 221 F.2d 786 (9th Cir. 1955).	9
Cohen v. United States, 378 F.2d 751 (9th Cir. 1967) cert. denied 389 U.S. 897 ( ).	9
In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	5
Mann v. United States, 319 F.2d 404 (5th Cir. 1963).	8
McKenzie v. Montana, 433 U.S. 905, 53 L.Ed.2d 1089, 97 S.Ct. 2968 (1977)	7
Monaghan v. Standard Motor Co., 96 Mont. 165, 29 P.2d 278 (1934).	10
Morrissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.288 (1952)	6
Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975).	5
Patterson v. New York, 432 U.S. 197, 53 L.Ed.2d 281, 97 S. Ct. 2319 (1977).	5
State v. Collins, ___Mont.___, ___P.2d___, 35 St. Rptr. 992 (1978).	6
State v. Garney, 122 Mont. 491, 207 P.2d 506 (1949).	10
State v. McKenzie, ___Mont.___, ___P.2d___, 35 St. Rptr. 759 (1978).	7
State v. Sandstrom, ___Mont.___, 580 P.2d 106, 35 St. Rptr. 744 (1978).	1
State v. Schaefer, 35 Mont. 217, 88 P.792 (1907).	10
State v. Sharbono, ___Mont.___, 563 P.2d 61, 34 St. Rptr. 196 (1977).	6
United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).	8
United States v. Berzinski, 529 F.2d 590 (8th Cir. 1976).	9
United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977).	8
United States v. Erb, 543 F.2d 438 (2d Cir. 1976) cert. denied 429 U.S. 981 (1976).	9

TABLE OF CASES (continued)

	Page
United States v. Garrett, 574 F.2d 778 (3d Cir. 1978).	8
United States v. Robinson, 545 F.2d 301 (2d Cir. 1976).	9

STATUTES

R.C.M. 1947, §94-5-102.	6
U.S. Const. Amend. XIV, § 1.	1

MISCELLANEOUS

Mont. R. Evid. 301 (1977).	9
Webster's New Collegiate Dictionary 668 (6th ed. 1956).	10

RECEIVED
SEP 12 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5384

DAVID SANDSTROM, Petitioner,

-v-

STATE OF MONTANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

David Sandstrom, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Montana entered in the above-entitled case on June 8, 1978.

OPINIONS BELOW

The Supreme Court of Montana has issued an opinion in this case, a copy of which appears in Appendix A to this Petition, at page 14. The opinion is officially reported at 35 St. Rptr. 744, 580 P.2d 106. The judgment of the Supreme Court of Montana is printed in Appendix A hereto, infra, page 22. An order denying rehearing is also included in Appendix A of this petition, at page 21. The Journal Entry of Judgment of the District Court of the Third Judicial District of the State of Montana is printed in Appendix A hereto, infra page 24.

JURISDICTION

The judgment of the Supreme Court of Montana (Appendix A infra, page 22) was entered on June 29, 1978. The timely petition for rehearing was denied on June 28, 1978 (Appendix A, infra, page 21). The jurisdiction of the Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specially set up or claimed under the Constitution of the United States. 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Did the Jury Instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts," deprive the Petitioner of his Constitutional right to due process of the law?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privleges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added

STATEMENT OF THE CASE

On November 1, 1976, Mrs. Annie Jessen, eighty-nine years of age and a life-long resident of Anaconda, Montana, was found dead in her home. She was the victim of an assault involving blows to her head by a shovel and five stab wounds in her back from a kitchen knife. Mrs. Jessen had also been sexually assaulted, apparently after her death.

On or about November 22, 1976, Petitioner, David Sandstrom, eighteen years of age, and also of Anaconda, was arrested with regard to an unrelated burglary. Shortly thereafter, while in custody of the Deer Lodge County Sheriff, Petitioner confessed to the slaying of Mrs. Jessen. This confession was later collaborated by various circumstantial facts; the identification of a pubic hair found on Mrs. Jessen as being probably that of Petitioner's; and by Petitioner leading Deer Lodge County law enforcement officers to Warm Springs Creek in Anaconda where he had thrown the knife.

Based upon the confession and collaborating evidence, Petitioner was charged on December 2, 1976, with Deliberate Homicide in that he, "purposely or knowingly caused the death of Annie Jessen." [Information, Appendix B, infra, page 27].

At his arraignment on this charge, Petitioner entered a plea of not guilty and simultaneously filed a notice of intent to rely on a mental disease or defect excluding responsibility for the alleged crime. Pursuant to such notice, Petitioner was examined by Dr. William Stratford, a psychiatrist practicing in Missoula, Montana, and Dr. Michael Nash, a clinical psychologist practicing in Bozeman, Montana. The reports of both doctors were in agreement as to their evaluation of Petitioner's mental condition at the time of the death of Mrs. Jessen. Both men found that Petitioner did not suffer from a mental disease or defect which, under the Montana Criminal Code, would relieve him of responsibility for his acts. Both men did find, however, that Petitioner, a person of borderline retarded intelligence, suffered from a personality disorder marked by impulsiveness, aggressiveness, and a lack of planning. Additionally, the doctors stated that the characteristics of Petitioner's personality disorder, impulsiveness and aggressiveness, would be aggravated to a serious degree by alcohol consumption. On the night the Petitioner caused the death of Mrs. Jessen, evidence shows that he had consumed between three and four six-packs of beer and some whiskey. The doctors formed the opinion, after considering the combination of Petitioner's personality, the evidence of intoxication, and the circumstances surrounding the fatal acts, that Petitioner did not intend the death of Mrs. Jessen. Based on the expert opinions of Drs. Stratford and Nash, Petitioner's attorney informed the jury in his opening remarks that he no longer intended to rely on a mental disease or defect excluding responsibility, but rather intended to contest the allegation that Petitioner acted knowingly or purposely in taking Mrs. Jessen's life.

Petitioner's trial commenced July 18, 1977. The Prosecution's case consisted of the confession together with collaborating evidence. The defense, comprising the testimony of Drs. Stratford and Nash, took the posture that the Petitioner did not have either "purpose" or "knowledge" in causing Mrs. Jessen's death. Both experts supported Petitioner's contention that he did not deliberately cause the death of Mrs. Jessen and it was their opinion that Petitioner did not form the specific intent required by law as an element of the offense of Deliberate Homicide.

Following presentation of all the evidence, the Court included in its instructions to the jury the instruction that, "The law presumes that a person intends the ordinary consequences of his voluntary acts." [Jury Instruction No. 5]. This instruction requested by the Prosecution, was objected to by Petitioner's attorney as contravening the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States by shifting the burden of proof to the Petitioner on the issue of intent. The trial court, however, overruled the objection.

The jury found the Petitioner guilty of Deliberate Homicide and he was subsequently sentenced to one hundred years confinement in the Montana State Prison. (Appendix A, infra, pp. 24,26). This verdict was timely appealed to the Supreme Court of Montana. A principal question raised in that appeal concerned the Constitutionality of Jury Instruction No. 5. See State v. Sandstrom, 34 St. Rptr. at 746 (Appendix A, infra, page 16). The Supreme Court of Montana, however, affirmed the trial court's verdict in a decision dated June 8, 1978. In that decision, the Court stated that the instruction was not violative of due process standards. State v. Sandstrom, 580 P.2d at 109, 34 St. Rptr. at 748. (Appendix A, infra, page 20).

A timely petition for rehearing, again questioning the constitutionality of Jury Instruction No. 5, was denied June 28, 1978. (Appendix A, infra, page 21).

REASONS FOR GRANTING WRIT

I. THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS," DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF THE LAW.

The Petitioner was charged with Deliberate Homicide under Section 94-5-102(1)(a) of the Revised Codes of Montana: criminal homicide committed "purposely or knowingly." Jury Instruction No. 5, "The law presumes that a person intends the ordinary consequences of his voluntary acts." in effect, eliminated the element of intent from the jurors' consideration thereby depriving Petitioner of protections afforded under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Under the Due Process Clause, a criminal charge must be established by proof beyond a reasonable doubt of every element of the offense. In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970).

> "Let there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at 1073 (emphasis added).

Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), clarified Winship by declaring that a state could not, by the use of presumptions, shift the burden of proof to the defendant. See also, Patterson v. New York, 432 U.S. 197, 215, 53 L.Ed.2d 281, 295, 97 S.Ct. 2319 (1977). The Court, in Mullaney, rejected the Maine homicide scheme which shifted the burden of proof to the defendant to prove heat of passion on sudden provocation. The Court refused the argument that, oftentimes, the burden upon the prosecution to negate the existence of heat of passion in a homicide offense is too onerous and should properly be placed on the defendant.

> "No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable

> doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential." 421 U.S. at 701, 95 S.Ct. at 1891.

Accordingly, Jury Instruction No. 5, which required the jury to presume intent from the "ordinary consequences of his voluntary act," denied Petitioner his right of due process. The giving of this instruction relieved the State of proving all the elements of the Petitioner's alleged crime, specifically that he acted purposely or knowingly, beyond a reasonable doubt. This instruction precluded the issue of specific intent by requiring the jurors to presume such intent from the acts of the Petitioner. "[T]he trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." Morrissette v. United States, 342 U.S. 246, 274, 72 S.Ct. 240, 255, 96 L.Ed.288 (1952). "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." Id...

In Montana, an element of Deliberate Homicide is that such a homicide be committed "purposely or knowingly," R.C.M. 1947, §94-5-102(1)(a). State v. Collins, ___Mont.___, ___P.2d___, 35 St. Rptr. 993, 999 (1978). The language "purposely or knowingly" embodies the concepts of 'mens rea' and 'criminal intent'. State v. Sharbono, ___Mont.___, 563 P.2d 61, 72-73, 34 St. Rptr., 196, 211 (1977). The jury not only had to find that the Petitioner caused the death of Mrs. Jessen, but also, it had to find beyond a reasonable doubt, in consideration of all the evidence, that he caused her death purposely or knowingly. Jury Instruction No. 5 eliminated the element of specific intent, purpose or knowledge, by requiring the jury to presume such intent from the consequences of Petitioner's act.

II. THE MONTANA SUPREME COURT DECISION, IN PETITIONER'S APPEAL, IS NOT IN ACCORD WITH WINSHIP, MULLANEY, OR PATTERSON.

The opinion in Petitioner's appeal relied heavily upon a case decided concurrently therewith by the Supreme Court of Montana;

State v. McKenzie, ___Mont.___, ___P.2d___, 35 St. Rptr. 759 (1978). McKenzie was decided upon remand from this Court. In remanding, this Court directed the Montana Court to decide an issue on the use of presumptions in light of Patterson v. New York, supra.. McKenzie v. Montana, 433 U.S. 905, 53 L.Ed.2d 1089, 97 S.Ct. 2968 (1977). In State v. McKenzie, the Supreme Court of Montana ruled on the Constitutionality of the use of three jury instructions which inferred or presumed intent in a Deliberate Homicide offense. 35 St. Rptr. at 778. One of the questioned presumption instructions in McKenzie was identical to Jury Instruction No. 5; the jury instruction the Petitioner herein contests. The Supreme Court of Montana decisions in McKenzie and Petitioner's appeal, however, were not decided in accord with Patterson.

Patterson, unlike McKenzie and Petitioner's appeal, concerned affirmative defenses. The State of New York, as required by its murder statute, had to prove beyond a reasonable doubt all the elements of that offense; death, intent to kill, and causation. 432 U.S. at 205, 53 L.Ed.2d at 289. A murder defendant in New York, however, has to prove, by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance for which there is a reasonable explanation. 432 U.S. at 206, 53 L.Ed. at 289. Unlike Patterson, in McKenzie and Petitioner's appeal, the basic statutory element of intent in Deliberate Homicide is allowed to be presumed from the act causing the death. The basic discrepancy between Patterson and the Montana decisions in McKenzie and Petitioner's appeal, stems from the fact that "nothing was presumed or implied against Patterson." 432 U.S. at 216, 53 L.Ed.2d at 295. Patterson, in the area of presumptions, reaffirmed Mullaney.

> "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." 432 U.S. at 215, 53 L.Ed.2d at 295. (emphasis added)

By requiring the jury to presume the essential element of intent from the acts of the Petitioner, the trial court and the Montana Supreme Court denied Petitioner his Constitutional right to have that element proven beyond a reasonable doubt.

The Supreme Court of Montana, in the Petitioner's appeal, thus did not decide the due process question on the use of presumptions in criminal proceedings in accord with the Patterson, Mullaney, or Winship decisions.

III. JURY INSTRUCTIONS OF THE TYPE THE PETITIONER HEREIN COMPLAINS, HAVE BEEN HELD BY A NUMBER OF FEDERAL CIRCUIT COURTS OF APPEAL TO BE VIOLATIVE OF DUE PROCESS OF LAW.

Three Federal Circuit Courts of Appeal have expressly forbidden the use of presumption instructions virtually the same as Jury Instruction No. 5. The Fifth Circuit banned the so-called 'Mann' instruction, the same type of instruction the Petitioner herein contests, in 1963. Mann v. United States, 319 F.2d 404 (5th Cir. 1963). That same Circuit, after fourteen years, reaffirmed and strengthened its position against instructions presuming intent in United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977).

> "1. No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence." 560 F.2d at 1255.

The Third Circuit has also banned the use of this type of instruction in the District Courts of that Circuit.

> "Hereafter, district courts in this circuit shall not use language in instructions that reasonably can be interpreted as shifting the burden to the accused to produce proof of innocence. This includes charges indicating that the law presumes a person to intend the natural and probable consequences of his knowing acts, as well as charges substantially similar to that given in this case." United States v. Garrett, 574 F.2d 778, 782 (3d Cir. 1978) (emphasis added).

In United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975), the Second Circuit stated its view on the use of an instruction which directed the jurors should presume that a person intends the

natural and probable consequences of his act.

> "We have for many years warned against the use of this type of a charge and are somewhat surprised at its continued use...[We wish] to take this opportunity to again stress our disapproval of the 'natural and probable consequences' charge and to remind trial judges that its continued use may jeopardize otherwise sound convictions." 529 F.2d at 159. See also, United States v. Erb, 543 F.2d 438, 447 (2d Cir. 1976) cert. denied 429 U.S. 981 (1976), and United States v. Robinson, 545 F.2d 301, 306 (2d Cir. 1976).

Two other Federal Circuit Courts, the Ninth Circuit and the Eighth Circuit, have also disapproved of intent-presumption instructions which, for all purposes, are identical to Jury Instruction No. 5. See, Bloch v. United States, 221 F.2d 786, 788-89 (9th Cir. 1955); Cohen v. United States, 378 F.2d 751, 755 (9th Cir. 1967) cert. denied 389 U.S. 897; United States v. Berzinski, 529 F.2d 590, 593-94 (8th Cir. 1976).

The rationale of all these Federal Circuit Court opinions is that the burden-shifting nature of intent-presumption instructions deprives the defendant of due process of law. These Circuit Court opinions are, of course, authority and precedent for the relief the Petitioner now requests because due process protection is required of the States through the Fourteenth Amendment to the United States Constitution. The opinions of the Second, Third, Fifth, Eighth, and Ninth Federal Circuit Courts of Appeal display that this question of federal substance and concern is deserving of the attention and guidance of this Court; not only because it is one of first impression, but also because it involves a vital area of Constitutional protections.

IV. PRESUMPTIONS IN MONTANA HAVE THE WEIGHT AND EFFECT OF EVIDENCE AND SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

It is explicitly clear from early Montana Court rulings and the Montana Rules of Evidence that a presumption has the weight and effect of evidence and stands until controverted by a preponderance of evidence to the contrary. Mont. R. Evid. 301 (b)(2) Commission Comment (1977). Rule 301 of the Montana Rules of Evidence defines

presumption:

> "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding." Id.(a) (emphasis added).

Rule 301 further describes the classification and effect of disputable presumptions.

> "A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption." Id. (b)(2).

This rule codifies earlier Montana case law. See Monaghan v. Standard Motor Co., 96 Mont. 165, 173-74, 29 P.2d 278 (1934).

Prior Montana case law, however, held that the use of presumptions, in criminal proceedings, was improperly burden-shifting and misleading. The Montana Court, for instance, prohibited the use of a presumption identical to Jury Instruction No. 5 because it was misleading to the jury. State v. Schaefer, 35 Mont. 217, 221, 88 P.792 (1907). State v. Garney, 122 Mont. 491, 493-95, 207 P.2d 506 (1949).

At Petitioner's trial, even though a presumption instruction was used, there was not one instruction given which defined the classification, nature, or effects of presumptions in criminal proceedings. The commonly-accepted meaning of 'presume,' as used in Jury Instruction No. 5, allowed the jury to believe the fact presumed without proof. See Webster's New Collegiate Dictionary 668 'presume" n.2 (6th ed. 1956). In other words, Jury Instruction No. 5 misled the jury to take for granted that the Petitioner had the requisite intent if his act was proven as causing Mrs. Jessen's death. The effect of Jury Instruction No. 5 was to direct the jury to accept, without question, the existence of 'purpose or knowledge' in the Petitioner's act. This deprived Petitioner of his 'due process' right to have every element of the charge against him proved beyond a reasonable doubt. Thus, whether the jury understood the word presume by its common meaning or by that word's meaning

under Montana law, Jury Instruction No. 5 would still fail to meet the Constitutional standards of the Due Process Clause. On one hand, the issue of intent would be virtually eliminated from the jurors' consideration while on the other hand, the Petitioner would be forced to prove, by a preponderance of the evidence, the nonexistence of specific intent; that is, purpose or knowledge.

V. THE ISSUE OF PETITIONER'S INTENT WAS PROPERLY RAISED BY THE TRIAL EVIDENCE AND SHOULD HAVE BEEN SUBMITTED TO THE JURY FOR A DETERMINATION OF INNOCENCE, OR GUILT BEYOND A REASONABLE DOUBT WITHOUT THE STATE HAVING BENEFIT OF A PRESUMPTION.

Petitioner's defense, at trial, was that he did not act purposely or knowingly. Jury Instruction No. 5, however, prevented the Petitioner of an adequate consideration of this defense. It was not disputed that Petitioner's acts caused the death of Mrs. Jessen, but Petitioner did dispute the finding that he had either purpose or knowledge as required under the Montana Deliberate Homicide statute. It was not the Petitioner's position that he suffered from a mental disease or defect which made it impossible for him to form the requisite intent to commit Deliberate Homicide. It was rather Petitioner's position that he did not in fact at that time and place deliberate upon or specifically intend to cause the death of Mrs. Jessen.

To display the absence of a criminal intent in his acts, Petitioner introduced the testimony of two expert witnesses at trial. Both expert witnesses, Dr. William Stratford, a psychiatrist practicing in Missoula, Montana and Dr. Michael Nash, a clinical psychologist practicing in Bozeman, Montana, examined the Petitioner. The men found that the Petitioner, a person of borderline intellectual retardation, suffered from a personality disorder marked by impulsiveness, aggressiveness, and a lack of planning.

Other evidence produced at trial displayed that the Petitioner had consumed a significant amount of alcohol prior to the fatal acts;

between three six-packs and a case of beer, and some whiskey. Both experts stated that this alcohol consumption intensified and worsened the Petitioner's existing long-term personality disorder. Both men were of the opinion that Petitioner did not intend to cause the death of Mrs. Jessen. Indeed, the testimony of Drs. Stratford and Nash displayed that a number of factors, including Petitioner's low intelligence, his personality characteristics, and his alcohol consumption, prevented him from forming the intent required by statute to commit the offense of Deliberate Homicide.

The question of Petitioner's intent, raised by the experts' testimony, was one of fact which properly should have been submitted to the jury for a determination of innocence or guilt beyond a reasonable doubt. The State, however, prejudged any conclusion on the subject of Petitioner's intent by requiring that vital element of the offense of Deliberate Homicide to be presumed from Petitioner's act. Petitioner's counsel made a timely objection to Instruction No. 5 upon the grounds of a violation of due process of law. As shown above, allowing one element of an offense to be presumed upon proof of another is not in accord with this Court's decisions in Winship, Mullaney, or Patterson. Indeed, allowing such a presumption to be made contravenes the basic Constitutional due process guarantees of proof beyond a reasonable doubt.

The questions raised by this petition are ones of first impression in this Court. It is evident from the disparity between the Supreme Court of Montana's decision in Petitioner's appeal and the decisions shown above from the Second, Third, Fifth, Eighth, and Ninth Federal Circuit Courts of Appeal, that guidance is needed in this vital area of federal substance and concern. Until such a ruling is made, jurisdictions, in which essential elements of crimes are allowed to be presumed, will continue to deprive

criminal defendants of their Constitutional rights under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully Submitted,

September 8, 1978
Date

Byron W. Boggs
Byron W. Boggs
Attorney for Petitioner

PROOF OF SERVICE

I, BYRON W. BOGGS, Attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September 8, 1978, I served a copy of the foregoing petition on the State of Montana, Respondent herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to Mike Greely, Attorney General for the State of Montana, Helena, Montana 59601, and John Radonich, County Attorney, Deer Lodge County, Anaconda, Montana 59711; attorneys of record for Respondent.

Byron W. Boggs
Byron W. Boggs
Attorney for Petitioner
212 East Park Avenue
Anaconda, Montana 59711

APPENDIX A

No. 14064

IN THE SUPREME COURT OF THE STATE OF MONTANA

1978

STATE OF MONTANA,

Plaintiff and Respondent,

-vs-

DAVID SANDSTROM,

Defendant and Appellant.

Appeal from: District Court of the Third Judicial District, Honorable Robert J. Boyd, Judge presiding.

Counsel of Record:

For Appellant:

Byron Boggs argued, Anaconda, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
John Radonich argued, County Attorney, Anaconda, Montana

Submitted: May 3, 1978

Decided: JUN - 8 1978

Filed: JUN - 8 1978

Thomas J. Kearney
Clerk

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

On November 1, 1976, Mrs. Annie Jessen, 89 years of age, was found dead in her home in Anaconda, Montana, the apparent victim of a brutal assault in which she received blows to her head from a shovel, and five stab wounds to her back from a kitchen knife. Mrs. Jessen had, in addition, been sexually assaulted and received a compound fracture to her leg, apparently after the slaying.

On November 22, 1976, defendant, 18 years of age, was arrested for an unrelated crime. Shortly thereafter, and while in custody of the Deer Lodge County sheriff, defendant confessed to the slaying of Mrs. Jessen. The confession was subsequently corroborated by certain physical evidence.

Based upon the confession and supporting evidence, defendant was charged, by an Information filed December 2, 1976, with the crime of deliberate homicide, in violation of section 94-5-102, R.C.M. 1947.

At the arraignment on the charge, defendant entered a plea of "not guilty" and filed a notice of intent to rely on mental disease or defect excluding criminal responsibility, as a defense.

Defense counsel subsequently moved for a change of venue, based upon allegedly prejudicial pretrial publicity. The motion was heard on July 6, 1977 in the District Court, Deer Lodge County. Defendant presented the testimony of four witnesses. Three of the four witnesses testified that, despite their perception that many Anaconda area residents had formed some opinion concerning the case, the defendant could receive a fair trial in Deer Lodge County. The fourth witness, Oscar Sandstrom, the father of defendant, testified primarily concerning abusive phone calls he had received following his son's arrest. The motion was denied with leave to renew at the time of jury selection.

The trial on the charge commenced on July 18, 1977. Defendant's renewed motion for change of venue was denied. Defendant further moved that the jurors be examined in voir dire individually and in segregation, which motion was also denied. Following voir dire, defendant again renewed his motion for change of venue. The motion was again denied.

In his opening statement, defense counsel informed the jury that defendant no longer intended to rely on the defense of mental disease or defect. The decision to so inform the jury appears to have been based on the reports of two psychiatrists who had examined defendant and determined he was able to appreciate the consequences of his actions, despite his low intelligence level and aggressive/impulsive personality.

The case-in-chief for the state consisted of defendant's confession, together with the corroborating physical and circumstantial evidence. Defendant called as witnesses the two psychiatrists who had examined defendant prior to trial. The witnesses testified that, while defendant may not have had the specific intent to kill at the time of the offense, it was their opinion that he had the intent to "silence" Mrs. Jessen, and was conscious of his activity in bringing about the result.

Following the reception of evidence and upon their deliberations, the jury returned a verdict convicting defendant of the crime as charged. Defendant was subsequently sentenced to 100 years imprisonment in the Montana State Prison.

Defendant appeals the judgment of conviction, entered upon the verdict of the jury.

Defendant raises two issues for review: (1) Did the District Court abuse its discretion in denying defendant's motions for change of venue? and (2) Did the District Court err in giving court's instruction No. 5?

Defendant first argues that the District Court abused its

discretion in denying his three motions for change of venue on the grounds an impartial trial could not be afforded defendant in Deer Lodge County. It is maintained the pretrial publicity, given the nature of the crime in this case, rendered selection of an impartial jury impossible.

The applicable statute in this regard, section 95-1710(a), R.C.M. 1947, states:

> "The defendant * * * may move for a change of place of trial on the grounds that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county."

Accordingly, it is well settled that granting a change of venue in a criminal trial is within the sound discretion of the trial court, and the denial of a motion for change of venue will only be reversed upon a showing of an abuse of discretion. State ex rel. Hanrahan v. District Court, (1965), 145 Mont. 501, 401 P.2d 770; State v. Corliss, (1967), 150 Mont. 40, 430 P.2d 632; State v. Olson, (1971), 156 Mont. 339, 480 P.2d 822.

It has been held that mere publication of a news story dealing with the facts and circumstances of the crime is not a sufficient basis for change of venue. Published accounts of crimes are not considered prejudicial unless so passionate as to excite undue prejudice, rendering it impossible to empanel a trial jury free from prejudice against the defendant. State ex rel. Hanrahan v. District Court, supra; State v. Corliss, supra.

Defendant relies on Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1938), and State v. Dryman, (1954), 127 Mont. 579, 269 P.2d 796, as authority for reversing a conviction in which change of venue had been denied, despite adverse pretrial publicity. The cases, however, are clearly distinguishable on the basis of the volume and content of the publicity.

Here, the publicity under consideration consists of 17 newspaper articles concerning various aspects of the crime, the investigation, and the subsequent arrest of defendant. Two of the articles, published after defendant's arrest, contain a picture of defendant in police custody.

Considering the nature of the crime involved, we find the reporting extremely objective and factual. Further, we do not consider the amount of publicity given to the crime and ensuing events in this case to be unreasonably voluminous. We conclude that there was no abuse of discretion in the District Court's refusal to grant defendant's motion for change of venue.

It is significant to note that the witnesses at the hearing on defendant's initial motion for change of venue, with the sole exception of defendant's father, testified they believed defendant would receive a fair trial in Deer Lodge County, despite the pretrial publicity and existence of some measure of adverse public opinion.

Further, while certain of the twelve empaneled jurors had read or heard something regarding the crime, there exists no requirement that jurors be totally ignorant of the facts involved in the case before them. It is sufficient if the juror can lay aside any impressions or opinions and render a verdict based upon the evidence presented at the trial. State v. Moran, (1963), 142 Mont. 423, 384 P.2d 777; State v. Simpson, (1939), 109 Mont. 198, 95 P.2d 761.

Defendant next contends the District Court erred in giving court's instruction No. 5 to the jury. Instruction No. 5 states:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

The given instruction paraphrases the language of section 93-1301-7(3), R.C.M. 1947, giving rise to the rebuttable presumption.

Defendant, in essence, contends the given instruction shifts to a defendant the burden of disproving an element of the crime charged, i.e. intent. It is maintained the state is thus relieved from proving an essential element of the crime charged, contrary to recent pronouncements of the United States Supreme Court. In re Winship, (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L Ed 2d 368; Mullaney v. Wilbur, (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L Ed 2d 508; Patterson v. New York, (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L Ed 2d 281.

The recent decisions relied on by defendant generally prohibit, under the auspices of the due process clause, shifting to a defendant, such as by presumption, the burden of proof regarding an essential element of the offense, most typically the element of criminal intent. In re Winship, supra; Mullaney v. Wilbur, supra; Patterson v. New York, supra. However, such cases do not prohibit allocation of some burden of proof to a defendant under certain circumstances. Rather, the concern expressed in such cases is that the State prove every element of the offense charged as that offense is defined by state law. State v. McKenzie, (No. 13011, Decided June 7, 1978).

Moreover, an instruction similar in effect to that under consideration here has received recent consideration and approval by this Court in State v. Coleman, ___Mont.___, ___P.2d___, 35 St.Rep. 560. In fact, the very instruction was approved by this Court in State v. McKenzie, supra, by the following language:

> "The presumptions that an unlawful act was done with unlawful intent, and that a person intends the ordinary consequences of his voluntary act, have been a part of Montana law since 1895. This Court has previously approved the use of these presumptions in criminal cases on the issue of intent. State v. Caryl, (1975), 168 Mont. 414, 426, 543 P.2d 389; State v. McLeod, (1957), 131 Mont. 478, 489, 311 P.2d 400, 407. See also State v. Jones, (1963), 143 Mont. 155, 181, 387 P.2d 913. The conclusions drawn through the use of these presumptions are generally fair and reasonable ways to ascertain intent which, of course, can never be proved directly * * *." ___St.Rep.___.

A review of the transcript of the trial in this case demonstrates that the State satisfied its burden of proof of each of the elements of the offense charged, including the element of intent. Defendant's sole burden under instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted "purposely" or "knowingly". We hold the instruction does not violate due process standards as defined by the United States or Montana Constitution, and as interpreted by relevant case authority, and therefore does not constitute reversible error.

The conviction of defendant is affirmed.

John Conway Harrison
Justice

We concur:

Frank I. Haswell
Chief Justice

Gene B. Daly

David J. Shea

John C. Sheehy
Justices

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14064

STATE OF MONTANA,

Plaintiff and Respondent,

vs.

DAVID SANDSTROM,

Defendant and Appellant.

ORDER

PER CURIAM:

Appellant's petition for rehearing in the above named cause having been filed, and the same considered by this Court,

IT IS HEREBY ORDERED that the petition for rehearing in the above named cause is denied.

DATED this 28th day of June, 1978

Frank I. Haswell
Chief Justice

Gene B. Daly

John Conway Harrison

John C. Sheehy
Justices

In the Supreme Court of the State of Montana

June 30th 78

Helen Kelley

14064
D.C.#2877

March Term A. D. 1978

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Third *Judicial District, in and for the County of* Deer Lodge *Greeting:*

WHEREAS, In the said District Court in a cause between State of Montana

Plaintiff... and Respondent *and* David Sandstrom

Defendant... and Appellant *wherein the* Judgment *of the said District Court, entered in said cause on the* 11th *day of* August *A. D. 19* 77

was in favor of the said Plaintiff *and* Respondent *and against the said* Defendant *and* Appellant

as by the inspection of the transcript of the record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the statute of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

AND WHEREAS, in the March *term of court in the year of our Lord, one thousand nine hundred and* seventy-eight *said cause came on to be heard before said Supreme Court and was argued by counsel.*

-App. A p. -22-

-App. A p. -22-

that the Judgment *of the Court below, entered in this cause on the* 11th *day of* August *A. D. 1977*

is affirmed.

Costs in this Court:

Appellant Appearance - $ none

Respondent Appearance - $ none

Remittitur - - - - - - $ none

June 8 *A. D. 19*78

You, THEREFORE, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

WITNESS: The Honorable Frank I. Haswell *Chief Justice of the Supreme Court of the State of Montana, this* 29th *day of* June *A. D. 1978*

Richard T Conboy

Deputy Clerk of the Supreme Court of the State of Montana.

-300-
STATE PUBLISHING CO

-App. A p. -23-

-App. A p. -23-

Filed July 25 1977
Helen Meloy, Clerk
Gloria Lord
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF DEER LODGE

STATE OF MONTANA,
Plaintiff,
-vs-
DAVID SANDSTROM,
Defendant.

No. 2878

J U D G M E N T

After written waiver of preliminary hearing by the defendant, David Sandstrom, and Order of Justice of the Peace John Sajcich binding the defendant over to District Court for trial, a criminal Information was filed on December 2, 1976, by the County Attorney for Deer Lodge County as attorney for the State of Montana, charging the defendant with the following FELONY: Burglary, in violation of Section 94-6-204(1), R.C.M. 1947, as amended, committed on or about November 12, 1976.

The defendant was arraigned on December 3, 1976, and advised of the nature of the charges against him, of the maximum sentence after a plea or verdict of guilty, of his right to a jury trial, and of his right to counsel, either retained by the defendant or appointed by the court if the defendant was indigent.

The defendant was thereafter represented by Public Defender, Byron Boggs, as counsel and on July 19, 1977, entered a plea of guilty to the above criminal charge.

The defendant appeared in open court on July 25, 1977, and was asked if he had any legal cause to show why sentence and judgment of the court should not be imposed at that time, and the defendant replied in the negative;

NOW, THEREFORE, it is the sentence and judgment of the court as follows:

1. The defendant shall be imprisoned in the State Prison at Deer Lodge, Montana, for a period of ten (10) years;

2. The defendant shall receive a total credit of two hundred forty nine (249) days for time served in jail prior to sentencing;

The defendant is hereby remanded to the custody of the Sheriff of Anaconda--Deer Lodge County for transportation to the State Prison for execution of this the sentence and judgment of the court.

Dated this 25th day of July, 1977.

Robert H. Boyd
District Judge

STATE OF MONTANA }
County of Deer Lodge } ss.

I, HELEN MELOY, Clerk of the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge, do hereby certify that the above is a full, true and correct copy of the original as the same appears in the files and records of this office.

WITNESS my Hand and Seal of this Court this 21st day of Aug., 1978

Clerk

By Angela Kiesler Deputy

CERTIFIED COPY

July 25 '77
Angela Kiesen

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE

STATE OF MONTANA,
Plaintiff,
-vs-
DAVID SANDSTROM,
Defendant.

Cause No. 2877

MF 4 773

V E R D I C T

Deliberate Homicide

We, the jury in the above entitled action find the defendant, DAVID SANDSTROM, guilty of the crime of deliberate homicide.

Dated this 21 day of July, 1977.

Robert L Buhl
Foreman

STATE OF MONTANA,) ss
County of Deer Lodge.)

I, HELEN McCOY, Clerk of the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge, do hereby certify that the above is a full, true and correct copy of the original as the same appears in the files and records of this office.

WITNESS my Hand and Seal of this Court this 21st day of Aug 1978

Clerk

By Angela Kiesen Deputy

APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE

* * * * * * * * * * *

STATE OF MONTANA,
Plaintiff,
-vs-
DAVID SANDSTROM,
Defendant.

NO.

I N F O R M A T I O N

* * * * * * * * * * *

COMES NOW Joseph C. Connors, Deer Lodge County Attorney, as attorney for the State of Montana, after the Defendant, David Sandstrom, having waived and refused a preliminary examination in Justice Court and Justice of the Peace, John M. Sajcich, having bound the defendant over to District Court for further proceedings, and, therefore, the undersigned accuses David Sandstrom with the crime of Deliberate Homicide, a felony, in violation of Section 94-5-102, committed in Deer Lodge County, Montana, as follows:

On or about November 1, 1976, in Deer Lodge County, Montana, the defendant, David Sandstrom, purposely or knowingly caused the death of Annie Jessen by stabbing the said Annie Jessen in the back with a knife, which was in violation of the above statute and against the peace and dignity of the State of Montana.

The maximum sentence for said offense is imprisonment in the State Prison for any term not to exceed one hundred (100) years.

December 2, 1976.

/s/ Joseph C. Connors
Deer Lodge County Attorney
Attorney for the State of Montana